BEFORE ARBITRATOR C.F. DAMON, JR.

STATE OF HAWAII

IN THE MATTER OF THE ARBITRATION BETWEEN HAWAII GOVERNMENT EMPLOYEES ASSOCIATION, AFSCME LOCAL 152, AFL-CIO, Union, and STATE OF HAWAII, DEPARTMENT OF HUMAN SERVICES, Employer.	)	Re: Grievance of .....

DECISION AND AWARD

C. F. Damon, Jr.
1600 Pauahi Tower
1001 Bishop Street
Honolulu, HI 96813

Arbitrator

I. INTRODUCTION

This arbitration arose pursuant to the Collective Bargaining Agreement ("CBA") dated April 29,1994 between STATE OF HAWAII, DEPARTMENT OF HUMAN SERVICES, ("Employer") and HAWAII GOVERNMENT EMPLOYEES ASSOCIATION, AFSCME LOCAL 152, AFL-CIO, ("Union").

At issue is whether the jurisdiction and authority of the arbitrator must be decided before holding a hearing on the merits of the case, which involved the termination of employment of a disabled employee. Employer was represented by Maria C. Cook, Esq., Deputy Attorney General, and Union by Dennis W. S. Chang, Esq. The parties agreed their positions would be presented by written submissions and that it was not necessary to hold a formal hearing. Employer's Motion to Dismiss and Memorandum in Support thereof was submitted in January 19, 1999; Union's Reply thereto on March 6, 1999; Employer's Response on March 12, 1999; and Union's Reply on March 22, 1999.

II. BACKGROUND

By letter dated November 16, 1998 from Ms. Cook, this Arbitrator was informed that he had been selected by Employer and Union as arbitrator in this matter. On December 2, 1998 in a pre-hearing telephone conference between this Arbitrator, Ms. Cook and ..... representing Union, it was agreed by the parties that the arbitration should be bifurcated, so that the issue of the arbitrator's jurisdiction to act would be determined before hearing the question of termination.

By letter dated December 10, 1998, Union changed its position and opposed such bifurcation.

By letter dated January 9, 1999, Employer advocated bifurcation. By his letter dated February 1, 1999, this Arbitrator held:

> "The Union has not cited any prejudice to its member if the matter is bifurcated. The Union agreed to bifurcation. To set arbitration hearing dates at this time would cause unnecessary delays. Accordingly, it is the Arbitrator's decision that the arbitration will be bifurcated."

On September 12, 1991, Grievant became disabled. The Director of Labor ruled that she suffered a compensable injury on the job and Employer was ordered to pay for her medical treatment and wage loss benefits. During the next several years, Employer attempted to find, a suitable job for Grievant, keeping in mind the restrictions imposed by Grievant's medical counselors, that the job should have little or no stress and preferably work under the supervision of a non-Japanese supervisor. Since the job search efforts were not successful, Employer terminated Grievant's employment on ..... pursuant to Administrative Rule § 14-14-14-(a)10 which provides:

> "§14-14-14 Termination of employment. (a) An appointment authority may terminate the services of an employee for any of, but not limited to, the following reasons:
> ...
> (10) No suitable placement can be made for a disabled employee."

III. ISSUES

1. Is the subject matter of the dispute arbitrable under the provisions of the CBA?

2. Stated another way, does this Arbitrator have jurisdiction over claims arising from the interpretation and application of the Civil Service Administrative Rules, the Civil Rights Act of 1991, and the Americans with Disabilities Act?

IV. EMPLOYER'S POSITION

1. The Unit 3 CBA dated April 29, 1994 is the existing arbitration agreement between the parties. Article 11 of the CBA restricts the scope of arbitration to the CBA itself.

2. The CBA does not contain any provisions relating to procedures for the placement of disabled employees. Therefore, the Arbitrator has no authority to proceed with this arbitration.

3. Article 3 of the CBA does not incorporate by reference the Civil Service Administrative Rules and the Federal Statutes.

4. The doctrine of collateral estoppel applies. In a recent Hawaii arbitration (1998) involving similar facts, the arbitrator held that Article 3 of the CBA does not incorporate the Administrative Rules regarding handicap job placement.

5. It is absurd for Union to say that Grievant's termination was for a disciplinary purpose. Union has not presented any factual support for this contention.

V. UNION'S POSITION

1. Ample judicial precedent compels holding that an arbitration of the merits of Grievant's grievance is warranted;

2. Public policy favors having an arbitration on the merits especially because labor relations in the public sector as regulated by HRS Chapter 89 prohibits the use of strikes and work stoppages;

3. The termination and refusal to give Grievant a job were retaliatory and disciplinary in violation of the CBA and a violation of Grievant's rights as a handicapped person;

4. Employer has a heavy burden of proof in its motion to dismiss and must positively convince the Arbitrator that the agreement does not cover Grievant's claim;

5. Employer failed to act on Grievant's counselors' recommendations and did not try to accommodate Grievant's return to work; and

6. Whether Grievant's termination was disciplinary is a disputed fact and cannot be addressed and decided by way of a motion to dismiss.

VI. DECISION

This case has been bifurcated, so that pursuant to Hawaii case law (Koolau Radiology, Inc. v. Queen's Medical Center, 73 Haw.433, 445 (1992), when the issue of arbitrability is raised, it must be determined whether the parties have a valid arbitration agreement and whether the dispute is arbitrable under

such agreement. There is no question that the CBA in question is valid. Furthermore, the CBA clearly limits the Arbitrator's authority, as follows:

> "ARTICLE 11, Section H.2. The Arbitrator's power shall be limited to deciding whether the Employer has violated any of the terms of this Agreement".

Since the Arbitrator's power is limited to the terms of the CBA, it is necessary to determine whether the CBA itself covers the question of Grievant's termination. Clearly, it does not. The CBA contains no provisions relating to disability, accommodation, job placement and non-discrimination requirements.

Employer argues that the Civil Service Administrative Rules and federal statutes (Civil Rights Act of 1991 and American with Disabilities Act) are not incorporated into the CBA, since ARTICLE 3 of the CBA states that an employee "shall retain all rights and benefits of the departmental and Civil Service rules and regulations and Hawaii Revised Statutes. . . ."; and since there is no specific incorporation of federal statutes into the CBA. In support of this position, Employer cites a 1998 Hawaii arbitration decision in a similar case. Arbitrator Ronald Brown stated in the Matter between the HGEA and State of Hawaii - Grievance of .....:

> "The Union argues that Article 3 was intended to incorporate by reference all of the rights and benefits of the Administrative Rules of the Civil Service Commission, including the disability provision, and thus make their alleged violation grievable under the Collective Bargaining Agreement. The Employer conceded there are many, but selected, areas of dual coverage of subject matters which are concurrently grievable under the Agreement and appealable under Civil Service Administrative Rules. . . The Employer pointed out,

> only the Civil Service Administrative Rules (and not the Agreement) provide procedures (in issue in this grievance) for the placement of disabled employees. The Employer argued Article 3 states, unless modified by the Agreement, employees shall retain all rights and benefits under the Civil Service Rules and Regulations; and since there was no modification in this Agreement on the issue in question, the rights and benefits of Title 14 are retained and employees (and Grievant) can pursue their rights and interests under Civil Service procedures - but not the grievance procedures of the Agreement. That is the Agreement says the rights are retained, not incorporated."

Although the Brown award involved a different collective bargaining agreement and does not mention the federal statutes, the language of Article 3 is identical in both agreements, and in both arbitrations the grievances were brought by HGEA. Employer argues that under the doctrine of collateral estoppel this Arbitrator should give the Brown award controlling effect. Employer cites authority supporting the proposition that collateral estoppel bars a party from relitigating a factual or legal issue necessarily decided in prior suit or a different claim involving the party against whom estoppel is asserted. This Arbitrator agrees with the holding in the Brown award and concludes that since the rights and benefits of the applicable rules and statutes are retained by the Grievant and not incorporated, this Arbitrator has no authority to proceed with an arbitration on the merits.

Finally, Employer argues that Grievant's termination of employment was based on Employee's inability to find a suitable position to accommodate a disabled employee and that the termination was not a disciplinary matter. Employer states that

it make no sense for an employer to punish an employee for his or her disability, and that Union has not produced sufficient evidence to support such a charge. This Arbitrator agrees with Employer that the assertion of a disciplinary violation without factual support or substantive content is insufficient to support a disciplinary charge.

Union alleges in its Reply Memorandum that an unfair and hostile work place caused Grievant's disability; that Grievant was improperly disciplined for speaking out; that when she voiced her complaints, supervisors and co-workers alike retaliated and harassed her; and that she was assigned a heavier and unmanageable work load. As a result of these and other complaints, she became acutely ill and severely depressed. Union further alleges that after her termination, Employer failed to act on her counselors' recommendations and did not try to accommodate her return to work. In this regard, Union alleges that Grievant was hiring employees in open positions that met her restrictions.

Union also argues that several U.S. Supreme Court cases and a Hawaii Supreme Court case support the view that the issues herein are arbitrable. However, as pointed out by Employer, ARTICLES H. 1, H.2 and H.3 of the CBA provide:

> "1. The Arbitrator shall not have the power to add to, subtract from, disregard, alter or modify any of the terms of this Agreement.
>
> 2. The Arbitrator's power shall be limited to deciding whether the Employer has violated any of the terms of this Agreement.

3. The Arbitrator shall not consider any alleged violations or charges other than those presented in Step 3."

It is the position of this Arbitrator that this arbitration is governed by the CBA itself, pursuant to the position asserted by Employer. Further, Union's allegation that Employer failed to act on Grievant's counselors' recommendations and did not try to accommodate Grievant's return to work is simply not supported by the record. Employer's Exhibits 3, 5, 6, 7, 8, 9 and 12 collectively list a number of attempts by Employer to find a suitable job for Grievant, given the strict limitations imposed by Grievant's counselors. Arguably, perhaps Employer could have enlarged and accelerated its search but this Arbitrator concludes that Employer's efforts were reasonable under the circumstances. Grievant claims that Employer was hiring employees in open positions that met her restrictions. However, this Arbitrator can find nothing in the record before him which supports this allegation.

VII. AWARD

For the reasons stated above, this Arbitrator grants Employer's Motion to Dismiss for Lack of Jurisdiction and refers the grievance back to the parties without a decision or recommendation on its merits, pursuant to ARTICLE 11 of the CBA.

DATED: Honolulu, Hawaii, June 14, 1999.

C. F. DAMON, JR.
Arbitrator

STATE OF HAWAII)
) SS.
CITY AND COUNTY OF HONOLULU)

On this 14th day of June, 1999, before me personally appeared C.F. DAMON, JR., to me known to be the person described in and who executed the foregoing instrument, and acknowledged that he executed the same as his free act and deed.

Jessie Tugade-Parmley
Notary Public, State of Hawaii

My commission expires: 4/15/2000